THE MIDDLE GROUND

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President's Message

By Randy Loftis
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I am grateful to you for allowing me the honor of serving as President of the Middle District Chapter of the Federal Bar Association for the 2014-15 year. I also give my sincere thanks to President-Elect Brian Anderson, Treasurer John Korzen, and to Magistrate Judge Joi Peake, Membership Chair.

It is such a privilege to be a part of the Federal Bar Association, and to practice law with the outstanding judges and lawyers in the U.S. District Court for the Middle District of North Carolina. As my farewell message, I would like to share some history of our federal court system. The following is excerpted from Bruce A. Ragsdale, Federal Judicial Center, Establishing a Federal Judiciary (2007), available at http://www.fjc.gov/public/pdf.nsf/lookup/establishjudiciary.pdf/$file/establishjudiciary.pdf:

> Article III of the Constitution, drafted in the summer of 1787, offered only the briefest sketch of the court system . . . . The Constitution mandated a Supreme Court . . . . The Constitution also granted the Congress the option to establish 'such inferior courts' as it saw fit . . . . The constitutional outline for the judicial branch, which stood in contrast to the far more detailed plans for the legislative and executive branches, reflected the delegates' preoccupation with balancing the powers of the elected branches. . . .
>
> When the First Congress turned to the organization of the judicial branch, much of the debate centered on whether to establish lower federal courts or to rely on existing state courts to exercise federal jurisdiction. Advocates of a strong central government thought a national system of federal courts was an essential requirement for energetic government. Other members of Congress, recalling the colonial experience under British rule, thought that justice was best served by courts tied to local communities. Those who were suspicious of the concentration of national power wanted to grant state courts authority to hear all cases involving federal law or to limit local federal courts to admiralty and maritime law. The judiciary act approved in September 1789 established a federal court system with broad jurisdiction, but the act reserved a significant role for state courts and guaranteed that the diversity of legal traditions throughout the country would be recognized in the local federal courts. (continued on page 10)

The Investiture of Judge Biggs: A Promise Fulfilled

Bennett D. Rainey
Allman Spry Davis Leggett & Crumpler, P.A.

On Friday, March 6, 2015, Judge Loretta Copeland Biggs was invested as United States District Judge for the Middle District of North Carolina. The heartwarming ceremony, which was held in the third floor courtroom of the L. Richardson Preyer Federal Building in Greensboro, North Carolina, exhibited the formality, integrity, and respect that both Judge Biggs and the public deserved.

For a pragmatist, the investiture was simply the ceremonial introduction of the Middle District's 14th District Judge. For those who appreciate history, justice, the rule of law, and exceptional individuals who create history and uphold justice, the investiture was a grand affair that took pause of the present to honor the past and prepare for the future.

Judge Biggs' investiture was appropriately held in one of the most awe-inspiring courtrooms in the state. The marble and gold leaf accents of the courtroom highlighted not only the fine craftsmanship of the architect, but also the gravity of the ceremony. This backdrop, along with the impressive list of attendees, commanded the reverence of all in attendance. Although the atmosphere of the occasion was created primarily by the setting and the individual attendants and speakers, the ceremony would not have been an investiture of a federal district judge were it not for the event's historical and current significance and purpose.

Formality and Respect

An investiture is a ceremony that formally honors and recognizes an individual as the recipient of an appointable position. Like an inauguration, an investiture symbolizes the beginning of an appointee's term. Although appointees typically hold their positions of authority before they are invested, the investiture is not a mere formality. In a very real sense, an investiture is society's way of demanding that the *position* be given the respect it deserves by both the public and the person being invested.

The investiture appears to owe its origin to formal ceremonies of yore, such as "livery of seisin" — the formal land conveyancing ceremony established in feudal England. A necessary component of any land transaction, livery of seisin required the physical exchange of property (e.g., a twig, piece of ground, or key) between the buyer and seller in the open presence of witnesses who, unable to read a will or deed, would be put on notice of the conveyance sufficient to attest to its occurrence should its legitimacy ever be questioned. Formalized rituals ensured that the purpose of the ceremony would be honored and respected, not only by those directly involved in the transaction, but by the community at large. In other words, the rituals legitimized the underlying transaction.

The investiture of a federal district judge uses formality and ceremony to emphasize the importance of the judge's role in defending and protecting our Constitution. Federal district judges are charged with the responsibility of addressing every aspect of each case brought before them as an opportunity to uphold the Constitution. Judges are aided in their fulfillment of this duty by rules of civil and criminal procedure, rules of court, and rules of etiquette. These rules, some more formal than others, ensure that every case and party before the court is treated with fairness, dignity, and respect. The investiture marks the beginning of this duty and sets the bar accordingly.

The Investiture

Chief U.S. District Judge William L. Osteen, Jr. kicked off the investiture by welcoming everyone who attended. Speaking to a large audience, which spilled over into a second courtroom live-streaming the investiture, Judge Osteen set the tone of the cheerful, uplifting ceremony by drawing the audience's attention to the multitude of distinguished lawyers and judges in attendance. Judge Osteen emphasized the significance of the support, reverence, and confidence that so many accomplished individuals have for Judge Biggs.

The elegance of the investiture was undoubtedly enhanced when Judge Biggs' daughter, Jahmela Biggs, an actress, writer, and producer in Los Angeles, took the podium. Ms. Biggs spoke of her love and admiration for her mother and described how thankful she was to have such a remarkable role model in her life. Ms. Biggs' remarks conveyed a touchingly personal image of her mother and provided the audience with a unique glimpse into the life of Judge Biggs, not only as a lawyer and a judge, but also as a compassionate, strong, and loving individual.

Joslin Davis, a longtime friend and former law partner of Judge Biggs' at Allman Spry Davis Leggett & Crumpler, P.A., followed Ms. Biggs and expounded upon Judge Biggs' lifelong passion for, and commitment to, helping children and families improve their lives. Ms. Davis jubilantly detailed Judge Biggs' "head spinning accomplishments" both in and out of the courtroom and described Judge Biggs as an industrious attorney fully committed to public service and well prepared for the federal bench. Having worked with Judge Biggs for 12 years on numerous complex family law cases involving business valuations and in-depth financial analysis, Ms. Davis also attested to Judge Biggs' keen mind and wide array of expertise and experience.

Ms. Davis concluded her remarks by informing the audience that the day of the investiture was extra special because it was also Judge Biggs' birthday. With that, the entire audience joined Ms. Davis in wishing Judge Biggs what had to be a truly Happy Birthday.

Walter C. Holton, Jr., founding partner of the Law Office of Walter Holton PLLC and former United States Attorney for the Middle District of North Carolina, then spoke of his experience working with Judge Biggs when she served as Executive Assistant United States Attorney from 1997 to 2001. Mr. Holton detailed Judge Biggs' exceptional devotion to federal service.

The Honorable Patricia Timmons-Goodson, retired Associate Justice of the North Carolina Supreme Court, provided attendees with an exceptionally eloquent illustration of Judge Biggs' true character and consistent ability to create success in all of her endeavors. A dear friend of Judge Biggs', Justice Timmons-Goodson offered insight into the person she knew both as a friend and as a fellow judge on the North Carolina Court of Appeals. Justice Timmons-Goodson, who herself is a brilliant jurist devoted to public service, also attested to Judge Biggs' admirable work ethic and legal acumen.

Tonya Williams, Special Assistant to Vice President Joseph Biden and Director of Legislative Affairs, spoke of her experience as one of Judge Biggs' law clerks at the North Carolina Court of Appeals. Ms. Williams touchingly described Judge Biggs as a firm, patient, and caring mentor who was, and still is, genuinely invested in the professional development of young lawyers. Expressing sentiments likely shared by every young lawyer who has had the opportunity to work with and learn from Judge Biggs (including this author), Ms. Williams recounted memories of a mentor who often gladly took time out of her day to answer questions, offer insight, and provide guidance. Ms. Williams' description of Judge Biggs was that of a woman who has mastered the art of being present. When Judge Biggs is with you, she is with you. She is attentive, engaged, and thoughtful. For young attorneys with little experience and big ambitions, Judge Biggs' time is beyond the billable hour — it is priceless.

After being administered the oath of office by Judge Osteen and being formally robed by her family, Judge Biggs was warmly welcomed to the Middle District by her newest colleagues, Judge Thomas D. Schroeder, Judge Catherine C. Eagles, Judge N. Carlton Tilley, Jr., and Judge James A. Beaty, Jr. The judges offered congratulations, shared their expectations, and reassured the audience that Judge Biggs has the natural and cultivated qualities necessary to serve as a U.S. District Court Judge.

The true highlight of the ceremony came when Judge Biggs offered her closing remarks and gave thanks to God and the family, friends, lawyers, and federal and state court judges who filled up the two courtrooms of the investiture. Judge Biggs also thanked President Obama and North Carolina Senators Kay Hagan and Richard Burr, both of whom facilitated Judge Biggs' nomination and confirmation through bipartisan support.

As Judge Biggs introduced various members of the audience, one could not help but feel the love, appreciation, and admiration that was mutually shared between Judge Biggs and those in attendance. Judge Biggs was truly thankful for the audience's support, and it showed.

The heart of Judge Biggs' closing remarks centered on a feeling she has had her entire life. In a very touching way, Judge Biggs explained how she first felt this indescribable sense of expectation, opportunity, possibility, and achievement as a young African-American girl in Atlanta, Georgia. Although others may have pessimistically focused on adversity and the difficult road ahead, Judge Biggs had an innate belief that she could be whoever she wanted to be — if she could dream it, she could do it.

It was not until many years later when Judge Biggs was finally able to articulate this motivating feeling. It occurred on a trip to the White House. Judge Biggs was waiting outside of the Oval Office when a particular painting caught her eye. In the painting, a young African-American girl, maybe 9 or 10 years old, is sitting

beside an aged house, devotedly clasping an American flag. Although the house could use a fresh coat of paint, the girl is neatly dressed and it is clear she is cared for. As she looks down at her flag, a deeply personal moment is taking place.

For Judge Biggs, the girl in the painting might as well have been her. If it were, then it was more than just a girl holding an American flag; it was a girl gripping tight to the American Dream guaranteed to her by the Constitution. Aptly named "Promised", the Stephen Scott Young painting resonated with Judge Biggs and immediately symbolized the promise that America made to her as a young girl in Atlanta. A living testament to the American Dream, Judge Biggs concluded her inspirational remarks by joyfully proclaiming that America had kept her promise and that she, in turn, would uphold her commitment to the Constitution and her community.▪

Clerk's Corner: An Update from the Clerk of Court for the United States District Court for the Middle District of North Carolina

By John S. Brubaker

Greetings to all. Please find the following suggestions and updates from the Clerk's Office for the Middle District of North Carolina.

Filing Documents Under Seal. If you are filing a document under seal and want to give access to other attorneys in the case, please remember to select all attorneys using the shift or control key on your computer. There have been instances where filers are inadvertently only selecting one attorney.

Serving Attorneys Who Have Been Terminated in CM/ECF. If an attorney has been terminated in CM/ECF, CM/ECF notifications will not go to the terminated attorney. It is extremely important that you or your staff review every Notice of Electronic Filing to see who has been served electronically!

Pro Bono Appointment List. Thank you to everyone who has already volunteered to participate in the Pilot Pro Bono Representation Program. More volunteers would still be appreciated, especially if you do not have a conflict with representing a *pro se* party suing a municipality. Volunteer attorneys are generally appointed only after summary judgment is denied and the case is set for trial. For further information, please refer to the Court's website.

Proposed Orders. Please remember to submit proposed orders in Word or WordPerfect format to the appropriate court e-mail address. Proposed orders should be submitted for motions where no supporting brief is required. If the motion can be ruled upon by the clerk of court, the orders should be sent to clerk@ncmd.uscourts.gov. If the related motion can be ruled upon by a District or Magistrate Judge, submit the order to the appropriate district judge order e-mail box unless the parties have consented to a magistrate judge handling the entire case pursuant to 28 U.S.C. § 636(c). Magistrate Judge order e-mail boxes should only be used when parties have consented to a Magistrate Judge under section 636(c). For a complete listing of the proposed order e-mail boxes, refer to section L of the CM/ECF Administrative Policies and Procedures manual. Unfortunately, many attorney filers are forgetting to submit proposed orders, which leads to delays and extra phone calls for Clerk's Office staff.

Diversity of Citizenship Cases. If you are claiming diversity of citizenship based on the location of a Limited Liability Company (LLC), please check that the law supports diversity jurisdiction. In a recent Middle District case, the Court issued a *sua sponte* order requiring the defendant filing a notice of removal to demonstrate why diversity jurisdiction existed for an LLC, whose principal place of business was outside of North Carolina, but no information was given regarding the location of the LLC's members. It's always great to have you filing cases with our Court; however, I hate to see you lose a complaint/removal filing fee! ▪

Juries and Social Media: A Cautionary Tale

by Katherine Blass Asaro
Law Clerk to the Honorable William L. Osteen, Jr.

A friend tells you they have a problem at work with their boss. They ask you to listen to their story and, when it's over, they ask what you think. What should they do? You listen intently and ponder the scenario. Then it hits you. You think you might have heard about this happening to someone else at your work. You think you saw it on Facebook. Wait a minute. You look it up on your phone . . .

Now picture that same fact pattern, but, instead of a friend, there is someone accused of a crime and you are a juror tasked with listening to all the evidence presented and making an impartial decision based on only that evidence. But once again, the story sounds familiar. So why not grab your phone and just look it up? What harm could that do?

Social media influences all facets of our daily lives, so it is no surprise that social media impacts the judicial system, too. Jurors with cell phones. Jurors with blogs. Jurors on Facebook. Jurors with access to research tools at their fingertips.

> Courts can no longer ignore the impact of social media on the judicial system, the cornerstone of which is trial by jury. We have always understood that, although we operate from the presumption that a jury's verdict will be just and fair, jurors themselves can be influenced by a host of external influences that can call their impartiality into question. The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program. The days of simply instructing a jury to avoid reading the newspaper or watching television are over. Courts must be more aggressive in enforcing their admonitions.

United States v. Fumo, 655 F.3d 288, 331 (3rd Cir. 2011).

Jurors use social media. This is a fact and should be presumed by judges and attorneys before and during jury trials. Through social media, jurors are able to communicate with the world in real time. Social media is not inherently damaging in any sense, but it has potential to disrupt the jury process in unique ways, including providing jurors the ability to immediately research, investigate, and privately acquire information that is not evidence in a case. "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. State of La.*, 379 U.S. 466, 472 (1965) (internal citation omitted). This problem is not specific to social media, but the ease of access to information and speed that social media and the internet provide trigger more and more questions of juror impartiality. What once would have taken time and at least finding a newspaper or taking a trip to the local library is now possible in the click of a mouse or a look at a phone.

In addition to the issue of juror consideration of extraneous information that is not evidence in the case, even innocent communications by jurors on social media can create tremendous problems for the court and counsel. Imagine a juror posting on Facebook that they are on the jury for "that big murder case" or the like. Even without more, it is likely obvious to those that know the juror what trial it is. A post like that opens jurors up to influence from others through comments and feedback. There is also the potential to chill deliberations if other jurors are worried their comments or ideas will somehow end up in social media. In an extreme case, it could lead to security implications, including ease of access to jurors for the purpose of improperly influencing the verdict. Ultimately, the issue presented by a juror's use of social media during a trial is the potential to prejudice the process, impact juror impartiality, and, in the extreme, the outcome of the trial.

> Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence. If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.

Fumo, 655 F.3d at 305. With this in mind, judges often proactively work to prevent jurors' use of social media from becoming an issue during a trial and deliberation. The most common method is through careful instruction to the jury.

The Federal Judicial Center has recommended, and many courts now use, preliminary and final instructions which specifically address social media. An example of preliminary instructions:

> Do not try to do any research or make any investigation about the case on your own. Furthermore, I instruct each of you to not use the internet to investigate or to communicate or receive any information that relates to this case in any way. Do not post, send or receive any information by Twitter, Facebook, cellular telephone or any other electronic means.

And again during final jury instructions before the jury begins deliberating:

> During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

The Federal Judicial Center surveyed district courts to assess the issue of jurors and social media and to identify strategies to prevent this from being a problem during trials and deliberations. The results, including example jury instructions, and the report from this survey are available at http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf. Anecdotally, these warnings appear to work. As most attorneys and judges have likely experienced, jurors take their duty seriously and follow the judge's instructions unwaveringly.

But sometimes, the jury instructions do not prevent unwanted behavior. "Apparently, even these instructions were not enough to keep jurors from at least alluding to their jury service on social media Web sites." *Commonwealth v. Werner*, 967 N.E.2d 159, 168 (Mass. App. Ct. 2012). When a judge is made aware of juror use of social media post-verdict that may rise to the level of affecting a jury's impartiality, various courts have approached the issue by applying different rules.

Generally, when inquiring into the validity of a jury verdict, "a juror may not testify about any statement made or incident that occurred during the jury's deliberations [or] the effect of anything on that juror's or another juror's vote." F. R. Evid. 606. However, there are exceptions. The relevant portion of Federal Rule of Evidence 606 states:

> A juror may testify about whether:
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
> (B) an outside influence was improperly brought to bear on any juror; or
> (C) a mistake was made in entering the verdict on the verdict form.

The United States Supreme Court's wisdom on this topic in 1954 is possibly even more relevant in the age of social media. "The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer v. United States*, 74 S. Ct. 450 (1954). If the court decides no such hearing is necessary, the court should be thorough in explaining why. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

When confronted with a juror who posted comments on Facebook during the trial about evidence presented at trial, the California Court of Appeals wrote:

> A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. Criminal defendants have a right to trial by an impartial jury. (U.S.

> Const., 6th Amend.) [T]here exists a strong public interest in the ascertainment of the truth in judicial proceedings, including jury deliberations. Lifting the veil of postverdict secrecy to expose juror misconduct serves an important public purpose. [T]o hear such proof would have a tendency to diminish such practices and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. When a trial court is aware of *possible* juror misconduct, the court must make whatever inquiry is reasonably necessary to resolve the matter.

Juror Number One v. Superior Court, 206 Cal. App. 4th 854, 866 (2012) (internal citations and quotations omitted). It is incumbent upon the courts to work to prevent juror misconduct and to attend to it when it does arise. Defendants are entitled to have a decision based on the evidence presented and the law as instructed. Social media presents new and numerous ways for a jury to lose that impartiality and fairness. The courts and the parties must remain vigilant in preventing such losses and be prepared to address them when they occur. ▪

Focus on Federal Practice: An Interview with Julie Theall Earp

By Kip Nelson and Farris Martini
Smith Moore Leatherwood LLP

Focus on Federal Practice is a column that focuses on a member of the M.D.N.C. Bar in each newsletter. This issue provides insight into the practice of Julie Theall Earp. She is a graduate of the University of Georgia (B.B.A.) and the University of Georgia School of Law (J.D.). She became the Chair of Smith Moore Leatherwood's Management Committee in April 2014 and recently served as Chair of the Middle District of North Carolina Chapter of the Federal Bar Association.

Q. *What originally brought you to practice in the Middle District?*

A. **I went to the University of Georgia School of Law, and, like most of my classmates, I was headed to the bright lights of Atlanta until I literally overheard a law school friend talking about this fantastic firm in Greensboro, North Carolina. I had only driven through Greensboro on my way from Delaware to visit my grandparents in Florida. I had never really thought about living in the Piedmont. But once I looked into it, the reputation of Smith Moore Smith Schell & Hunter brought me to Greensboro for an interview. And once I met the people here, I was hooked. I found a "live-able" city in which I could both practice law and raise children at the same time. It was, and still is, a great fit.**

Q. *How did you decide to focus on labor and employment issues?*

A. **I have always had an interest in the "people" side of business. My undergraduate degree was in Human Resources Management. And I really enjoy the courtroom, especially the federal courtroom.**

Q. *Do you have a "war story" from a Middle District case?*

A. **Lots of them! I think employment law ranks third—only behind criminal law and domestic law—in the number of "believe–it-or-not" types of fact patterns. My best "wins," though, are the ones that are resolved and no one hears about them. But I still remember a case in which I got an anonymous call from someone who offered to testify *against* a plaintiff who had a disability discrimination claim against my client, an employer. It turned out that the mystery witness was the plaintiff himself—offering to testify against himself. If you are confused, I can only say that I was, too. But it is one I won't forget.**

Q. *What are some qualities that you respect about members of the Middle District bar?*

A. **The lawyers of the M.D.N.C. are high caliber people, both in terms of intellect as well as in terms of professionalism. There is trust, credibility, and collegiality. Rarely do I meet a member of the bar of this Court that does not embody these characteristics. I think it may be this way because of the expectations of the judges and leaders of the bar who have come before us. They set a high standard, and we have benefitted from their example.**

Q. *Do you have any advice for an attorney unfamiliar with the Middle District (i.e. a new attorney or someone who doesn't practice here regularly)?*

A. **Read the local rules. Be on your best (most professional) behavior. Roll up your sleeves and do**

your best work. Skimping on your homework doesn't work in the Middle District.

Q. *What is one thing you've taken away from serving on the local chapter of the Federal Bar Association?*

A. **We try to put together interesting and informative CLE programs as a service to the Bar. We also try to give folks a chance to get together and see each other. If you have ever been to one of these events, you can see how much everyone appreciates the chance to catch up with one another. Leading a talented group of people is an easy job. It was an honor and a pleasure to serve as chair.▪**

Recent North Carolina State Bar Formal Ethics Opinions Regarding Social Media

By Catherine Lane
Nexsen Pruet, PLLC

This review is intended to highlight recent North Carolina State Bar Ethics Opinions of which practitioners should be advised. These Ethics Opinions will be discussed in the broader, and more national, Ethics Presentation which will be given by Gary L. Beaver at the June 1, 2015 CLE.

This past year has provided North Carolina practitioners with two new ethics opinions involving social media: 2014 FEO 5 (July 25, 2014) and 2014 FEO 8 (January 23, 2015). Additionally, on April 16, 2015, the State Bar Ethics Committee published a proposed substitute for 2014 FEO 5. 2014 FEO 5 involves advising a civil litigation client about any social media posting in which the client might engage, and 2014 FEO 8 involves connections between lawyers and members of the judiciary on LinkedIn and similar other social networking sites. As is common with the world of technology, these ethics opinions may leave practitioners with more questions than answers.

2014 Formal Ethics Opinion 5

2014 FEO 5 is intended to deal with the following fact scenario: "A client has a legal matter that will probably be litigated although a lawsuit has not been filed. The client's posting and other information on a social media website (referred to collectively as 'postings') could be used to impeach the client or are otherwise relevant to the issues in the lawsuit." N.C. State Bar Ethics Comm., Formal Op. 5 (2014). This is a broad fact pattern – it appears to apply to any type of social media forum and to any type of commentary on social media.

At its April 16, 2015 meeting, the State Bar Ethics Committee voted to publish a substitute opinion for 2014 FEO 5 (the "Substitute FEO 5"), but decided not to vote on whether to withdraw 2014 FEO 5 until there had been sufficient time for comment on the proposed substitution.

The thrust of 2014 FEO 5 is that, to the extent a client's postings on social media are "relevant and material" to the representation, a lawyer *must* advise the client about information on social media. A lawyer *may* counsel a client to remove postings on social media, but only if doing so will not constitute spoliation or be otherwise illegal. N.C. State Bar Ethics Comm., Formal Op. 5 (2014). The Substitute FEO 5 attempts to streamline these general mandates by stating that:

> [A] lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

N.C. State Bar Ethics Comm., Informal Op. 5 (2014).

2014 FEO 5 imposes upon a lawyer the duty to have "knowledge of social media and an understanding of how it will impact the client's case including the client's credibility." N.C. State Bar Ethics Comm., Formal Op. 5 (2014). The State Bar has determined that such knowledge is part of competent representation which a lawyer is required to provide under

Rules 1.1. and 1.3 of the North Carolina Rules of Professional Conduct. *Id.* Under this opinion, a lawyer is required to have an understanding about what social media forums are out there and have enough of a working vocabulary on such forums and "postings" in order to ask clients about their participation in such forums. In order to comply with 2014 FEO 5, it seems a lawyer will also need the knowhow to view and check social media forums. These required skills seem to be implied in the State Bar's second specific requirement that, if there is the possibility that a client's activity on social media might impact the potential lawsuit, or otherwise affect the representation, "the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments." *Id.*

The requirements placed upon lawyers by 2014 FEO 5 seem unwieldy. In response, in the Substitute FEO 5, the State Bar raises the question, which many practitioners may have, of "[w]hat is the lawyer's duty to be knowledgeable of social media and to advise the client about the effect of the postings on the client's legal matter?" N.C. State Bar Ethics Comm., Informal Op. 5 (2014). The Substitute FEO 5 retains the requirement outlined above but adds, borrowing language from a New Hampshire Bar Association Opinion, "'counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.'" *Id.* (quoting N.H. Bar Ass'n Op. 5 (2012-2013)).

In addition to the requirement that a lawyer become well-versed in the various forms of social media and that a lawyer discuss the legal ramifications of social media posting, 2014 FEO 5 requires a lawyer to understand the laws of spoliation and obstruction of justice. N.C. State Bar Ethics Comm., Formal Op. 5 (2014). 2014 FEO 5 opines that a lawyer may advise his client to remove social media postings provided (1) it does not constitute spoliation or is otherwise illegal and (2) the social media posting is preserved. *Id.* While 2014 FEO 5 does not advise as such, in some situations a client should remove the posting or comment in order to mitigate damages if such posting or comments constitute continuing damages.

Spoliation is "the destruction or material alteration of evidence or . . . the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silverstri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). As applied, the "doctrine of spoliation of evidence is 'where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case.'" *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001) (quoting *Yarborough v. Hughes*, 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905)). Thus a lawyer must walk the fine line of advising his client to remove social media postings and preserving those postings so as not to violate the doctrine of spoliation. This might require the lawyer to seek the advice of technology specialists in order to preserve social media postings in a manner that is both accessible in the future and also representative of the posting at the time it was removed.

The Substitute FEO 5 does not propose to change these mandates, but rather adds that a lawyer "may take possession of printed or digital images of the client's postings made for purposes of preservation." N.C. State Bar Ethics Comm., Informal Op. 5 (2014).

Finally, 2014 FEO 5 provides that a lawyer may advise a client to change the client's security and privacy settings in social media to the highest level available, provided doing so is "not a violation of law or a court order." N.C. State Bar Ethics Comm., Formal Op. 5 (2014). The Substitute FEO 5 does not propose to change this portion of 2014 FEO 5.

If one wishes to make a comment on the Substitute FEO 5, such comment should be emailed to ethicsadvice@ncbar.gov. Comments which are received before July 16, 2015 will be considered at the next Ethics Committee meeting.

2014 Formal Ethics Opinion 8

2014 FEO 8 advises attorneys on both connecting with the judiciary on professional networking sites, such as LinkedIn, and endorsements of and from the judiciary on such websites. The summary advisement from the State Bar is that "a lawyer may accept an invitation from a judge to be a 'connection' on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge." N.C. State Bar Ethics Comm., Formal Op. 8 (2014).

Many in the profession have a LinkedIn profile. LinkedIn profiles display the members' contacts or "connections" with others on the website. *Id.*

LinkedIn also allows a member to endorse or recommend other members, and if such endorsements or recommendations are accepted by the recipient, they are then posted to the recipient's profile. *Id.* Endorsements are of a member's stated "skills & expertise" on their LinkedIn profile. *Id.* A member will receive a notification that they are being endorsed and what specific skill or expertise is receiving the endorsement; the member can then choose to decline the endorsement. *Id.* If the member does not decline the endorsement then it will appear on the member's profile and will show the name and profile picture of the endorser. *Id.* A member can also edit her profile to hide selected endorsements. *Id.* Recommendations on LinkedIn are comments written by another member. *Id.* Recommendations are visible only to other LinkedIn members and can be hidden on a member's profile but cannot be deleted. *Id.*

2014 FEO 8 provides that it is generally acceptable for a lawyer to accept a connection invitation from a judge, and likewise, generally it is alright for a lawyer to send a connection invitation to a judge. *Id.* However, if the lawyer is engaged in proceedings before the judge, the lawyer must be sure to "avoid conduct prejudicial to the administration of justice; to not state or imply an ability to influence improperly a government agency or official; and to avoid *ex parte* communications with a judge regarding a legal matter or issue the judge is considering." *Id.* A lawyer is subject to these duties under Rules 3.5 and 8.4 of the North Carolina Rules of Professional Conduct. *Id.* If a lawyer receives a connection invitation from a judge during the pendency of a matter before the judge, the lawyer must consider these duties and may need to decline the invitation. *Id.* 2014 FEO 8 states that in such circumstances the lawyer "may communicate to the judge the reason the lawyer did not accept the judge's invitation. Such a communication with the judge is not a prohibited *ex parte* communication provided the communication does not include a discussion of the underlying legal matter." *Id.* These same duties and considerations apply when a lawyer is sending a connection invitation to a judge. *Id.*

Under 2014 FEO 8, a lawyer may endorse a judge's skills or expertise and/or may write a recommendation on the judge's profile page, provided the lawyer is not currently involved in a proceeding before the judge and doing so will not violate one of the Rules of Professional Conduct considered above. *Id.* A lawyer may not, however, accept an endorsement or recommendation from a judge and display that endorsement or recommendation on her profile page. *Id.* A lawyer may permit an endorsement or recommendation on his LinkedIn page from others, provided such endorsement or recommendation is "truthful and not misleading in compliance with the requirement so Rule 7.1" of the North Carolina Rules of Professional Conduct. *Id.* As an additional requirement, if a lawyer has previously accepted an endorsement or recommendation from an individual who, subsequent to the endorsement or recommendation, becomes a judge, the lawyer is required to remove the endorsement or recommendation. *Id.*

The final inquiry in 2014 FEO 8 is whether the opinion applies to other social media platforms such as "Facebook, Twitter, Google+, Instagram, and Myspace". *Id.* The answer is yes. The opinion is to apply to "any social media application that allows public display of connections, endorsements, or recommendations between lawyers and judges." *Id.*

As a result of 2014 FEO 8, practitioners need to review their LinkedIn profiles, and any other such networking sites, to ensure that they are aware of with whom they are connected (a judge before which the practitioner is currently appearing), and of what recommendations and endorsements are visible on their profile.▪

(continued from page 1, The President's Message *by Randy Loftis*)

The Judiciary Act of 1789 established three types of federal courts. The Supreme Court, with a chief justice and five associate justices, would meet twice a year in the nation's capital and hear appeals from lower federal courts and from the state supreme courts. The Supreme Court would also exercise the limited original jurisdiction defined by the Constitution. In each state and in Kentucky and Maine (then parts of other states), a district court with a single judge would have exclusive jurisdiction to hear cases involving admiralty and maritime law and conduct trials of minor federal crimes. The district courts shared with the state courts jurisdiction over small suits brought by the United States.

The most important federal cases would be initiated in the third type of court, called circuit courts, which would convene in the same judicial districts in which the district courts met. The circuit courts had no judges of their own, but were served by two Supreme Court justices and the local district judge. (Congress soon revised the law to require only one justice on each circuit court.) Congress grouped the judicial districts into regional circuits for the purpose of assigning justices to serve on the circuit courts within that region. The circuit courts would hear some appeals from the district courts, but they were primarily trial courts. The circuit courts had exclusive jurisdiction over serious federal crimes and shared with the state courts jurisdiction over suits involving disputes above a certain monetary value, suits involving the U.S. government, and suits between citizens of different states.

Congress protected distinctive state legal traditions by drawing the judicial districts to coincide with state boundaries and by providing for the use of the respective state's rules for most district and circuit court proceedings and for the selection of federal juries. Perhaps most important for protection of regional legal cultures, the assignment of "circuit riding" duties for Supreme Court justices ensured that the judges on the nation's highest court would learn about local legal procedures and would interact with citizens at the point where cases entered the federal judicial system. . . .

Within ten years of the establishment of the federal judiciary, the organization and jurisdiction of the federal courts became the subjects of fierce battles between the political parties that emerged in the 1790s. In 1801, after several years of debate on reorganization of the courts, the lame-duck Federalist majority in Congress approved an act that created new circuit courts with their own judgeships and greatly expanded federal jurisdiction at the expense of the state courts. The Judiciary Act of 1801 also abolished the circuit-riding duties of the Supreme Court justices. . . . With the support of President Thomas Jefferson, the new Republican majority in Congress soon repealed the Judiciary Act of 1801 and restored much of the court system, including circuit riding, that had been established in 1789. . . .

When California entered the Union in 1850, the limits of transcontinental transportation made circuit riding to that state impossible, and Congress created a temporary circuit judgeship to serve California. In 1863, Congress increased the number of Supreme Court justices to ten so that one of them could preside in a Tenth Circuit comprising the far western states. In 1866, Congress restored the number of circuits to nine, and in 1869 established circuit judgeships for each of the circuits. The new circuit judges relieved some of the pressure on Supreme Court justices, who continued to sit on the circuit courts. . . .

The Civil War and Reconstruction led to a substantial extension of federal jurisdiction. The various measures to enhance the authority of the federal courts and limit the reach of state courts culminated in 1875 when Congress granted the U.S. circuit courts jurisdiction to hear all cases arising under the Constitution and federal laws. The 1875 act also allowed parties in a case to remove proceedings from a state court to a federal court whenever a federal question was involved or if parties to the case were from different states.

In 1891, Congress established separate courts of appeals in each of the nine regional circuits and authorized an additional circuit judge for each circuit. The circuit judges would sit with district judges or a Supreme Court justice on three-judge panels in the appeals courts. . . .

The establishment of the courts of appeals almost immediately contributed to a reduction of the Supreme Court's caseload, but the Supreme Court still faced more cases than the justices could decide within a term. Justices were unable to attend circuit courts regularly, and in 1911 Congress repealed the required circuit duties for justices and abolished the circuit courts, thus making the district courts the sole general jurisdiction trial Courts, Caseloads, and Jurisdiction.

In the second half of the twentieth century, caseloads increased at a rate far greater than population growth. . . . New kinds of judgeships helped to expedite this growing business of the courts. In 1968, Congress established the position of magistrates, later called magistrate judges, to replace the commissioners who had long helped to process cases before the formal beginning of trials. Magistrate judges have since assumed greater responsibility for pretrial proceedings and the trial of some misdemeanors. In 1978, Congress established a formal position of bankruptcy judge, replacing the referees who had assumed judicial duties in addition to their administrative responsibility for bankruptcy cases. The bankruptcy judges serve as a unit of the district courts and preside over almost all bankruptcy proceedings. In the second half of the twentieth century, the number of court staff also grew to meet the administrative demands of increased caseloads.

Thank you again. I wish you all a good summer, and I look forward to continuing to work with you.▪

Federal Bar Association

Middle District of North Carolina Chapter

cordially invites you to attend its

SPRING 2015 CLE LUNCH PROGRAM
June 1, 2015

Lunch: 12:00 p.m.
CLE: 12:30-2:00 p.m.

W.R. "Randy" Loftis, *Constangy, Brooks & Smith LLP*
Welcome, Chapter President

Gary Beaver, *Nexsen Pruet, PLLC*
Social Media and Ethics* 12:30 – 1:30 p.m.
* 1 hour of NC State Bar Ethics Credit, pending approval

Monica Guy, *Bell, Davis & Pitt, P.A.*
Social Media and Trial 1:30 – 2:00 p.m.

Greensboro
Embassy Suites Hotel
204 Centreport Drive
Greensboro, NC 27409

To register, complete registration form on next page and return to Randy Loftis at the address provided on the registration form.

Registration Form

Registration Deadline is May 18, 2015

Federal Bar Association, MDNC Chapter
Attention: Randy Loftis
100 N. Cherry St., Suite 300
Winston-Salem, NC 27101
(336) 721-6850

Conference Name: 2015 Spring Luncheon and CLE

Conference Date: Monday, June 1, 2015

Conference Time: Registration 11:30 a.m.
Lunch 12:00 p.m.
CLE 12:30-2:00 p.m.

Conference Location: Embassy Suites Hotel
204 Centreport Drive
Greensboro, NC 27409

To register, please remit this form and payment by check, payable to "FBA MDNC Chapter," to Randy Loftis at the address above.

Attendee Information	
Name:	
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State Bar Number:	

Registration

CLE Registration Fee (Please check one.)

- ☐ Private Lawyer $50
- ☐ FBA MDNC Member $35
- ☐ CJA Panel Member $35
- ☐ Government Lawyer $35
- ☐ Law Student $25
- ☐ Judge $0

Check here to reserve a vegetarian option. ☐

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